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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1003

COUNTY OF IMPERIAL AND THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF IMPERIAL,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, JUAN DE LEON,

Respondents.

Appeal From United States District Court, Southern District of California.

Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM H. KRONBERGER, JR.,
1007 Fifth Avenue, Suite 1100,
San Diego, Calif. 92101
Attorney for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Respondents are individuals and respectfully pray that a Writ of Certiorari be denied and that this Court decline to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceedings on July 26, 1979.

Question Presented.

Where the California Supreme Court refused to determine whether a restriction against the sale of water for use outside of the County of Imperial constituted a violation of the Commerce Clause of the United States Constitution, may third parties not involved in that prior litigation invoke the jurisdiction of Federal Courts to declare such restrictions against the sale of water to be violative of the Commerce Clause provisions of the United States Constitution as an impermissible burden on foreign and interstate commerce?

REASONS FOR DENYING THE WRIT.

I

Petitioners Have Failed to Set Forth Any Grounds for the Granting of the Writ Within the Purview of U.S. Supreme Court Rule 19, 28, U.S.C.

Respondents herein believe that the decision of both the Court of Appeals for the Ninth Circuit and the decision of the United States District Court, for the Southern District of California, speak for themselves and are on point with respect to the merits of the case. Respondents will confine their discussion herein to an analysis of the grounds upon which Writs of Certiorari are generally granted. It is the contention of Respondents that the petition filed by the County of Imperial sets forth no grounds upon which this Petition for Certiorari should be granted. To that end, the argument will be confined to an analysis of the provisions of Rule 19 of this court and how such provisions relate to the case at hand.

Rule 19 provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The California Supreme Court has not decided any federal questions raised in the instant case. The only decision of the California Supreme Court bearing even remotely upon

the issues raised herein was the decision by that court not to rule on the question of whether or not the restriction against the sale of water constituted a violation of the Commerce Clause Provisions of the United States Constitution. In a nutshell, the question raised in the instant federal litigation was specifically not decided in the California litigation between the County of Imperial and defendant Donald C. McDougal.

In fact, as the California Supreme Court stated in *County of Imperial v. McDougal*, 19 Cal.2d 505, at page 511, 138 Cal.Rptr. 472, 564 P.2d 14 (1977):

> "In view of this conclusion, *we need not decide* whether the prohibition against the export of water was valid. (See, *City of Altus, Oklahoma v. Carr* (W.D. Tex. 1966) 255 F.Supp. 828) . . ." (Emphasis added).

In view of the California Supreme Court's express language, it can hardly be stated that the court has decided any federal issue, let alone reached a decision in conflict with federal law. The most that can be said of the California Supreme Court's refusal to decide the federal issue is that, at least as far as these Respondents are concerned, the language is an open invitation to bring the federal suit.

Continuing with the analysis of the grounds for certiorari, Rule 19(b) provides for review:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . ."

Such is certainly not the case in the instant matter. In fact, the decision of the Ninth Circuit Court of Appeals is specifically in accord with the decisions of its sister circuits and the explicit decision of the District Court for the Western District of Texas affirmed by this court in *Altus, Oklahoma v. Carr*, 255 F.Supp. 828 (W.D. Tex. 1966), aff'd, 385

U.S. 35 (1966). The City of Altus was challenging a Texas statute which forbade the drilling of a well in Texas and transporting the water outside of the state. The court found that such a prohibition of the interstate shipment of water was unconstitutional. Not only is there no conflict between the circuits, it is clear that there is harmony.

Further review of Rule 19 sets forth additional grounds where the Court of Appeal:

> ". . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law; . . ."

Neither the District Court or the Court of Appeals for the Ninth Circuit decided any important state questions in conflict with applicable state law.

Petitioners attempt to claim that a federal constitutional decision that a county may not control the export of water somehow conflicts with a state decision not to decide the the constitutional question of regulating commerce because the particular party before the state court was estopped to raise the issue. Petitioners' reasoning is circular at best and in no way rises to the dignity of demonstrating that the Court of Appeals decided an important state question in conflict with state law. Not only is the question a federal one rather than a state one, there has been no state judicial pronouncement on the constitutionality of a county regulation on export to foreign countries and states.

Rule 19 goes on the provide for the granting of a Writ of Certiorari in circumstances when the Court of Appeals:

> ". . . has decided an important question of federal law which has not been, but should be settled by this court; . . ."

All issues presented in the instant litigation have been before this court and in fact, settled. The question of pro-

hibitions against the shipment of water outside of a state's boundary has been decided in *Altus, Oklahoma v. Carr, supra,* and more recently expounded upon by this court in *Hughes v. Oklahoma,* 99 S.Ct. 1727 (1979). It is hard to imagine a case more directly on point that *Altus, supra.* There is no need for additional case law on the subject of the application of the Commerce Clause by the Court of Appeals or the district court.

The question of the ability of third party litigants to challenge a regulation on federal grounds is clear, even in circumstances where the same issue is under review in a separate state proceeding. *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939). In the present case there are *no state* proceedings pending, the judgment that McDougal is estopped to challenge the constitutionality of the County of Imperial's prohibitions against interstate and foreign commerce having become final. Petitioners cite *Vendo v. Lektro Ven Corp.*, 433 U.S. 623 (1977) as a reason to grant the instant writ, yet it should be remembered that *Vendo, supra,* is patently distinguishable on two basic grounds: (1) in *Vendo, supra,* a decision on the merits was reached by the state court while in the present case the California Supreme Court specifically declined to decide the issue; and (2) the parties in *Vendo, supra,* state proceedings were identical with the parties in the federal proceedings while the plaintiffs in the present case are strangers to the prior litigation between petitioner County of Imperial and McDougal in the state court.

There are no new questions of law presented in the petition, the County of Imperial simply seeks a rehearing and rehashing of arguments previously advanced at the District Court and Court of Appeals.

Finally, Rule 19 provides for the issuance of a Writ of Certiorari where the Court of Appeals' decision:

> " . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision."

The foregoing is the last clause of Rule 19(b) setting forth the grounds for review. It cannot seriously be maintained that the decision of the Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this court's powers of supervision. The Court of Appeals for the Ninth Circuit has simply sustained a preliminary injunction holding that allegations regarding *res judicata* cannot be sustained and directing the District Court when reaching the merits of the Commerce Clause question pay particular attention to *Hughes v. Oklahoma, supra.*

II

Conclusion.

The Writ of Certiorari prayed for by Petitioners simply should not be granted. The foregoing analysis of U.S. Supreme Court Rule 19 and the grounds for the granting of the Writ of Certiorari reveal an almost unreal failure of Petitioners to couch its petition in terms of the rules of this court. Nowhere in the petition on file herein are set forth any grounds whatsoever within the confines of Rule 19 for the granting of the petition. Rather, Petitioners simply rehash their older arguments while subtlety ignoring a discussion of the grounds for the issuance of the writ.

Petitioners throughout their brief continue to make the statement that the federal court decisions are somehow in conflict with a final decision of the California Supreme Court. How Petitioners continue to make this argument in the face of the specific findings of the California Supreme Court escapes Respondents. The California Supreme Court

simply never ruled on questions regarding the Commerce Clause of the United States Constitution, it simply cannot be said that the decision of the District Court, affirmed by the Court of Appeals, is in conflict with the non-decision of the California Supreme Court.

Respondents respectfully pray that this court deny the Writ of Certiorari and let the judgment and opinion of the Court of Appeals stand.

Respectfully submitted,

WILLIAM H. KRONBERGER, JR.,

Attorney for Respondents.